

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

January 11, 2008

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In the Matter of

Docket No. DEP-07-158

File No. SE44-0986

Robert Brink

Mattapoissett

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Recommended Final Decision

William D. Hall filed a request for adjudicatory appeal seeking review of the denial of a request for a superseding order of conditions by the Department's Southeast Regional Office. Mr. Hall is an abutter of the applicant, Robert Brink, to whom the Mattapoissett Conservation Commission had issued an order of conditions for the construction of a single family house under the Wetlands Protection Act, M.G.L. c. 131, s. 40. Although not specifically stated in the wetlands regulations, the denial of a request for a superseding order may be appealed to an adjudicatory hearing because it is as dispositive as an appeal of a superseding order. Matter of Eugene M. Novak and Christine Florio, Docket No. 94-11, Final Decision (October 21, 1994); Matter of Duxbury Beach Reservation, Inc., Docket No. 91-135, Final Decision (July 9, 1992). After reviewing the notice of claim and submittals in response to an Order to File a More Definite Statement and Order re Responses from Other Parties, I recommend that the appeal be dismissed for lack of jurisdiction due to untimeliness.<sup>1</sup>

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<sup>1</sup>The Department's rules for a more definite statement allow me to order a Petitioner to file evidence, and I did so at this preliminary stage in the interest of expeditiously resolving this appeal. As ordered, Mr. Hall filed a copy of the document being appealed, a copy of the order of conditions, a copy of his request for a

A conservation commission must issue an order of conditions by certified mail or hand-delivery to the applicant and at the same time to the Department. 310 CMR 10.05(6)(e). A copy of the order and the plans must be kept on file by the conservation commission and the Department, and must be available to the public at reasonable hours. 310 CMR 10.05(6)(f). Thus, the applicant and the Department receive individual notice of the issuance of the order, but all other entities who may request Department action receive notice through the placement of the order in the file and its availability to the public for review at the offices of the conservation commission and the Department.

Requests for superseding orders must be sent by certified mail or hand-delivered within ten days<sup>2</sup> of issuance of the order. 310 CMR 10.05(7)(c). This ten day period is jurisdictional and cannot be extended. Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993); Matter of Chasse, Docket No. 89-159, Final Decision (September 3, 1992). The period has been tolled only in unusual circumstances where notice or issuance is materially defective. See, e.g., Matter of 29 Hancock Street, LLC, Docket No. 2001-030, Recommended Decision (Nov. 15, 2001), Final Decision (Dec. 11, 2001)(time period tolled because conservation commission did not place order in file, so it was not available for public review when Petitioner visited the office within the ten day period). The order of conditions itself provides the information necessary for the filing of a superseding order, including the date of issuance. See WPA Form 5 – Order of Conditions. A conservation commission is not required to calculate the appeal period or provide additional appeal information.

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superseding order of conditions, and verification that he is an abutter to the project location. I also ordered Mr. Hall to obtain and file an affidavit from his representative, Mr. Peter Waldron, verifying the assertions contained in the appeal.

<sup>2</sup> Time periods of ten days or fewer are computed using business days only. 310 CMR 10.05(1).

Matter of Heras, Docket No. 94-103, Final Decision (July 5, 1995) (ten day period not tolled where petitioner relied on inaccurate calculation of time period by conservation commission).

In this case, the order of conditions for Mr. Brink's project was issued by the Mattapoissett Conservation Commission on September 11, 2007. The request for a superseding order of conditions by Mr. Hall was postmarked on October 4, 2007. The Southeast Regional Office denied the request as untimely on October 15, 2007. The request for a superseding order was unquestionably not filed within the ten day period required by the regulations. 310 CMR 10.05(7)(c). Mr. Hall appealed the denial, essentially on the grounds that tolling is warranted in his circumstances based upon the interaction of his representative, Mr. Peter Waldron, and the Mattapoissett Conservation Commission.<sup>3</sup>

In response to the Order to File a More Definite Statement, Mr. Hall submitted a letter from Mr. Waldron stating:

This letter is to confirm that I visited the office of the Town of Mattapoissett conservation committee on September 4, September 20, and October 2, for the purpose of establishing the proper time frame for filing an appeal of the Conservation Committee's decision in the above referenced case and was not given appropriate information to allow me to do so in a timely fashion.

The letter also states that in reviewing the circumstances, the Chairperson of the Conservation Commission and a staff person at DEP recommended prompt filing of a

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<sup>3</sup> Mr. Hall's appeal of the denial of his request for a superseding order, postmarked on October 24, 2007, was timely. Mr. Hall stated in his appeal that his representative, Mr. Peter Waldron, made three visits to the Department's Southeast Regional Office on September 4<sup>th</sup>, September 20, and October 4, 2007. He further stated that Mr. Waldron was advised by Marsha Perry, the Secretary for the Mattapoissett Conservation Commission on September 4<sup>th</sup> and 20<sup>th</sup> that the Order had not been filed. On October 4<sup>th</sup>, Mr. Waldron was advised at the Conservation Commission Office that the Order was filed on September 11<sup>th</sup> and the ten day appeal period had passed. Mr. Hall further states that Mr. Carmelo Nicolosi, Chairman of the Mattapoissett Conservation Commission, and Christine Odiago of the Southeast Regional Office indicated that he should file an appeal under the circumstances. He states that an appeal was filed on October 4, 2007.

request for a superseding order despite the passing of the official time frame, and Mr. Hall then filed the request.<sup>4</sup>

The Chairman of the Mattapoisett Conservation Commission, Carmelo Nicolosi, filed a detailed statement of facts relating to the Commission's review of the Notice of Intent filed by Mr. Brink, which extended from the first public hearing on June 25 to a vote at the final public hearing on August 27, 2007, followed by the issuance of the order of conditions within 21 days. As is his custom, he advised those in attendance of the right to request review by the Department within 10 days following issuance of the order of conditions.

Marcia B. Perry prepared a formal affidavit stating that Mr. Waldron was among three individuals who came to the Commission office on August 28, 2007 to request information on filing an appeal of Mr. Brink's project. She provided copies of the Department's WPA Form 5 which includes appeal procedures. She also advised them of the office hours and telephone number. She stated, "I have found no records indicating that anyone called with respect to the order or issuance" and "I have no recollection of Mr. Waldron inquiring if the Order had been issued before the end of the appeal period." She stated that she did recall such an inquiry after the appeal period had lapsed and that she received a request for a copy of the order from Mr. Hall on November 8, 2007. She stated that all documents on file with the Commission are available for public viewing during office hours and copies are provided on request for a nominal fee.

While the statements of Mr. Waldron and Ms. Perry are not consistent, I am able to conclude that there is no factual dispute that would warrant further proceedings. While the statements filed by the Commission are quite detailed and describe due attention to

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<sup>4</sup> Mr. Waldron's statement consisted of three sentences.

the procedures required by the regulations, the statement of Mr. Waldron is simply conclusory. The statement does not indicate to whom he spoke, what information he asked for, or what information was provided, but instead only asserts that the information was not “appropriate.”<sup>5</sup> Most importantly, Mr. Waldron does not state that he requested to see the file and it was not made available to him. A conservation commission is not required to give information related to the appeal period for a particular project.<sup>6</sup> Instead, it must make documents available for inspection by interested members of the public, and that inspection will provide the basis for an interested person to calculate the appeal period. See Matter of Heras, Docket No. 94-103, Final Decision (July 5, 1995); Matter of 29 Hancock Street, LLC, Docket No. 2001-030, Recommended Decision (Nov. 15, 2001), Final Decision (Dec. 11, 2001); Matter of Conroy Development Corp., Docket Nos. 2006-091, 2006-092, 2006-093, Final Decision (August 23, 2007). Ms. Perry states that all documents in the Commission’s files are available for public viewing. There is nothing in the record to support a conclusion that tolling is warranted.

While the regulatory obligation imposed upon commissions - and the Department - to communicate the issuance of an order by placing it in the files may seem almost perfunctory, it has considerable merit. The requirement of making files available for public inspection promotes efficient administration of the Wetlands Protection Act by avoiding disputes over oral communications between commissions and interested persons

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<sup>5</sup> The wetlands regulations place the burden of going forward on the person contesting the Department’s position. 310 CMR 10.03(2). The adjudicatory hearing rules state that an order for more definite statement may require the Petitioner to file sufficient evidence to meet the burden of going forward by producing at least some credible evidence from a competent source in support of the position taken. 310 CMR 1.01(11)(b). A Presiding Officer may on a party’s motion or her own initiative dismiss appeals for untimeliness and prepare a recommended decision for dismissal due to untimeliness. 310 CMR 1.01(5)(a)2.; 310 CMR 1.01(5)(a)15.f.v.

<sup>6</sup> The information on appeals is included on documents that can be appealed. The order of conditions form contains relevant appeal language; it is this form, not specific to Mr. Brink’s project, that Ms. Perry states that she provided to Mr. Waldron and two others on August 28, 2007.

over appeal periods and by ensuring that interested persons actually obtain and review the relevant documents prior to filing an appeal.<sup>7</sup> Based upon the absence of evidence to support a conclusion that the order of conditions issued to Mr. Brink was not available for public inspection in the files of the Mattapoissett Conservation Commission, I conclude as a matter of law that the request for a superseding order was required to be filed by Mr. Hall within the requisite ten day appeal period. I recommend dismissal of Mr. Hall's appeal for lack of jurisdiction because it was untimely.

**NOTICE- RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the  
Department of Environmental Protection. A signed copy of this document  
is on file at the DEP office listed on the letterhead.

Pamela D. Harvey  
Presiding Officer

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<sup>7</sup> This case is illustrative not only of the potential for disputes over oral communications about timeframes or the issuance of orders, but also of an appeal filed without actually reviewing the order of conditions. Here the Petitioner apparently obtained a copy of the order only after he filed both a request for a superseding order and a request for an adjudicatory hearing, because it was required in the order for more definite statement. A request must contain objections specific to the order. 310 CMR 10.05(7)(c).